THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 138

Record Number: 2019/342

High Court Record Number: 2017/6905P

Noonan J.
Haughton J.
Collins J.

BETWEEN/

SIOBHAN KELLETT

APPELLANT

-AND-

RCL CRUISES LIMITED, PANTHER ASSOCIATES LIMITED T/A CRUISE HOLIDAYS AND PANTHER ASSOCIATES T/A TOUR AMERICA

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 20th day of May, 2020

1. This appeal is brought from the judgment and order of the High Court, (Barr J.), of the 6th June, 2019 in which the court dismissed the plaintiff's claim for damages for personal injuries. I gratefully adopt the detailed statement of the facts as set out in the written judgment of the trial judge.

2. By way of brief summary, the appellant booked and paid for a seven day Caribbean cruise for herself and her husband. One of the scheduled stops was at the island of St. Maarten where the plaintiff had pre-booked a speedboat excursion described in the advertising material as a "White Knuckle Jet Boat Thrill Ride". The appellant paid a supplement for this excursion at the time of booking the cruise. The company providing the ride had a website with photographs and a video, together with a description of "an adrenaline-infused rush from a water rollercoaster ride". The publicity material described extreme manoeuvres carried out at high speed by the jet boat for thirty minutes "that will have you involuntarily laughing and 'praying for your life' and that will knock you silly!"

3. The jet boat was a fibreglass craft with three bench seats, each for four passengers. On the day in question there were ten passengers (including the appellant and her husband), and the skipper of the boat who sat in the front row at the controls. Each row of seats had a horizontal bar in front of it and the passengers were instructed to stay seated, hold the bar tightly and plant their feet firmly on the floor during the manoeuvres. The

appellant was seated beside the skipper and having indicated by hand signal in advance, he performed a 360 degree turn at speed.

4. Despite the fact that the appellant was holding the bar tightly, she was lifted out of her seat and struck her head against the skipper's head. He stopped the boat and told her to change places with her husband who was beside her so that she was now sitting on the starboard side of the front bench. The skipper again, after a warning, performed a 360 degree turn, this time in the opposite direction. Again the appellant was lifted out of her seat and was thrown back down with force, striking her right elbow against the gunwale, thereby suffering an injury. This ultimately transpired to be an undisplaced fracture of the right lateral epicondyle.

5. It is common case that the cruise booked by the appellant was a package holiday within the meaning of the Package Holidays and Travel Trade Act, 1995. The appellant claims that the injury she suffered was caused by the breach of contract and negligence of the respondents and as organisers of the package holiday, they are liable to compensate the appellant by virtue of section 20 of the 1995 Act. At the trial, the witnesses for the appellant on the liability issue were the appellant herself and a consulting forensic engineer. The respondents called no liability evidence. The engineer's evidence was that the respondents had been negligent in four respects:

    (i) The boat should have been fitted with seatbelts;
    (ii) there should have been a side bar or rail along the gunwale of the boat for the plaintiff to hold;
    (iii) there should have been padding on the gunwale;
    (iv) after the first incident, the skipper should not have seated the appellant beside the gunwale of the boat, but swapped her with a passenger in the last row thereby helping to wedge her in between three others.

6. The appellant's engineer gave no evidence of any relevant standards or regulations that might have applied to the activity in question in St. Maarten. Although he offered the view that items (i) to (iii) above should, in his opinion, have been provided, he was unable to offer any evidence of such features in any similar craft anywhere with the exception that he had once been on a boat on the Thames which had a side rail.

Judgment of the High Court

7. Having set out the facts in detail, the judge summarised the expert evidence given by the engineer on behalf of the plaintiff. He noted the criticisms to which I have referred including that the skipper should have swopped the appellant with one of the passengers in the back row so that she would be wedged in place. The engineer's evidence was that he was not aware of any Irish regulations governing such boat trips nor was he aware of any local regulations in St. Maarten. He had not examined the boat in question and his opinion was formed after speaking to the plaintiff and looking at the excursion operator's website and the boats shown thereon.

8. The judge then proceeded to set out the law in some detail referring to the statutory provisions and then the relevant case law to which I will refer further. Having analysed

all the relevant authorities, the trial judge posed what he described as the difficult question of "what standard of care can be expected of the service provider in the foreign country?"

9. His answer to the question was that the law was primarily to be found in the judgment of the Supreme Court in *Scaife v. Falcon Leisure Group (Overseas) Limited* [2008] 2 I.R. 359 where Macken J. found that "…[T]he standard by which the acts in question are to be judged is that of reasonable skill and care, which standard, if not expressed in a contract will be readily implied into it". The trial judge then added (at paragraph 39): -

> "To that, one can probably safely add that in general, if it is established that the service provider complied with all relevant local regulations and standards, they and the organiser will not be liable in negligence or breach of contract to the consumer, unless it can be shown that such local standards were patently deficient, or were not in conformity with uniformly applicable international regulations."

10. Having carefully analysed the law, the trial judge set out his conclusions. He noted that the engineer was unable to point to any standards or regulations in St. Maarten, or Ireland, or indeed elsewhere which would have mandated the use of the features, the absence of which he criticised. He said the case law makes clear that the onus rests on the plaintiff to establish that the service provider did not provide the service in accordance with local regulations or standards, or in accordance with internationally recognised standards. He held that the appellant had not established what the local standards were and thus, that there was a failure to comply with such standards. He found this to be an evidential deficit.

11. Having found this deficit, he went on to separately consider each of the complaints made and discounted them in turn for reasons which he explained. He said (at para. 61): -

> "In the circumstances, it is not necessary for me to determine whether the plaintiff could establish liability in the absence of any evidence as to the applicable standards in St. Maarten. I am satisfied that even if one were to apply standards which may be thought applicable in this jurisdiction, one could still not find that the White Knuckle Jet Boat Thrill Ride was provided without reasonable skill and care as required by the *Scaife* judgment."

12. He concluded that the appellant had not established any negligence on the part of the defendants or any liability under the terms of the 1995 Act and dismissed the claim.

Grounds of Appeal

13. Many of the grounds are somewhat generic and suggest that the trial judge had sufficient evidence, contrary to his findings, to determine that there had been negligence on the part of the respondents. Other grounds suggest that the findings were against the weight of the evidence. At paragraph 55 of his judgment, the trial judge said that "…one must also take account into that passengers… have to embark and disembark over the gunwales; the provision of a sidebar would constitute a serious trip hazard at each

embarkation and disembarkation of the vessel…" It is pleaded that there was no evidence led which supported this finding. It is said further that the judge applied the wrong test on the issue of liability.

14. The appellant further contends that the trial judge erred in his application of the 1995 Act by determining that there was an obligation on the appellant to provide evidence of local standards and that this amounted to an evidential deficit in the appellant's case. Finally, it is said that the trial judge erred in applying the provisions of the 1995 Act and the European regulations upon which it is based (Council Directive 90/314/EEC of 13 June 1990 of the European Communities on Package Travel, Package Holidays and Package Tours). The appellant contends that the stated purpose of the regulations is to protect the rights of consumers of package holidays and an interpretation which requires a claimant to incur the prohibitive costs of retaining a foreign resident expert to deal with local standards is inconsistent with the purpose of the Directive.

15. In this latter regard, the appellant in her submissions contended that the normal onus of proof should be reversed and the burden of establishing that there was compliance with local regulations lay upon the respondents.

16. It is important to note that no transcript of the evidence before the High Court was made available by the appellant to this court, the appellant claiming that she was unable to afford the cost of transcription of the DAR recording. This obviously handicapped the court in dealing with the appeal and insofar as any issues arose concerning the evidence in the High Court, these could only be considered by reference to the terms of the judgment itself and the written report of the engineer.

Package Holidays and Travel Trade Act, 1995

17. An "Organiser" is defined under the Act as a person who organises and sells "Packages" comprising of at least two of transport, accommodation or other tourist services. Section 20 provides: -

> "20.— (1) The organiser shall be liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by the organiser, the retailer, or other suppliers of services but this shall not affect any remedy or right of action which the organiser may have against the retailer or those other suppliers of services.
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> (2) The organiser shall be liable to the consumer for any damage caused by the failure to perform the contract or the improper performance of the contract unless the failure or the improper performance is due neither to any fault of the organiser or the retailer nor to that of another supplier of services, because—
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> (a) the failures which occur in the performance of the contract are attributable to the consumer,

(b) such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable, or

(c) such failures are due to—

(i) *force majeure*, that is to say, unusual and unforeseeable circumstances beyond the control of the organiser, the retailer or other supplier of services, the consequences of which could not have been avoided even if all due care had been exercised, or

(ii) an event which the organiser, the retailer or the supplier of services, even with all due care, could not foresee or forestall."

18. The 1995 Act gave effect under our domestic law to Council Directive 90/314/EEC on Package Travel, Package Holidays and Package Tours. The rationale behind the Directive, as explained in the recitals, is to harmonise the disparate laws on package holidays as between Member States which give rise to distortions in competition amongst operators established in different Member States. The economic importance of tourism is noted: -

> "Whereas tourism plays an increasingly important role in the economies of the Member States; whereas the package system is a fundamental part of tourism; whereas the package travel industry in Member States would be stimulated to greater growth and productivity if at least a minimum of common rules were adopted in order to give it a Community dimension; whereas this would not only produce benefits for Community citizens buying packages organised on the basis of those rules, but would attract tourists from outside the Community seeking the advantages of guaranteed standards in packages;"

19. The recitals also recognise the necessity for consumer protection in this area: -

> "Whereas if, after the consumer has departed, there occurs a significant failure of performance of the services for which he has contracted or the organiser perceives that he will be unable to procure a significant part of the services to be provided; the organiser should have certain obligations towards the consumer;
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> Whereas the organiser and/or retailer party to the contract should be liable to the consumer for the proper performance of the obligations arising under the contract; whereas, moreover, the organiser and/or retailer should be liable for the damage resulting for the consumer from failure to perform or improper performance of the contract unless the defects in the performance of the contract are attributable neither to any fault of theirs nor to that of another supplier of services;"

Scaife v. Falcon Leisure

20. The plaintiff went on a package holiday to Spain booked through the defendant which included hotel accommodation. The plaintiff fell in the dining room of the hotel due to a spillage on the tiled floor, as a result of which, she suffered personal injuries. The High Court held that by virtue of section 20 of the 1995 Act, the defendant was liable. The

defendant appealed to the Supreme Court. The sole judgment was delivered by Macken J. with whom the other members of the court agreed.

21. Macken J. noted the arguments advanced on the appeal by the parties and in particular, the submission of counsel for the defence that it was not possible to discern whether the standard to be imposed on the hotel owner or proprietor for whose acts the defendant was being sought to be made liable pursuant to section 20 of the 1995 Act, was the Irish legal standard or the Spanish legal standard, urging on the court that it must be the latter. The court referred to the provisions of s. 20 and of the Directive, as well as relevant provisions in Irish legislation such as the Hotel Proprietors Act, 1963 and the Occupiers Liability Act, 1995. Having referred to these provisions, Macken J. stated (at pp. 367-8): -

> "[22] As concerns the Directive itself, since s. 20 of the Act of 1995 faithfully transposes the provisions of art. 5 of the Directive, it is not necessary to set out the terms of that article separately. It is, however, relevant to cite art. 8 of the Directive which reads:-
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> > 'Member States may adopt or return more stringent provisions in the field covered by the Directive to protect the consumer.'
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> [23] It seems to me that the provisions of the Hotel Proprietors Act 1963 are within the ambit of art. 8 of the Directive since the obligation concerning the state of hotel or other premises, as well as the safety of guests, are provisions protecting the consumer which are or may be, more stringent than the provisions of the Directive. Similarly, apart from the statutory protection given to hotel guests as set forth above, and as specifically retained by the Act of 1995, an occupier's common law liability to visitors, now enshrined in s. 3 of the Occupiers Liability Act 1995, may well also fall within art. 8 of the Directive, even if not specifically referred to in the Act of 1995. Having regard to counsel for the defendant's argument, that the appropriate standard for the High Court to have applied is the standard operating in Spain and not the standard in Ireland, the question arises as to whether the High Court judge was entitled to invoke the standard operating by virtue, *inter alia*, of the above sections of the above Acts or the established common law tests."

22. In considering the answer to this question, Macken J. felt that it was useful to consider the Irish and United Kingdom cases on the appropriate test or standard to be applied. She noted that in Ireland, prior to the passing of the 1995 Act, the case law established that the standard of reasonable skill and care was appropriate in assessing the performance of services for the purpose of establishing whether there had been a breach of contract or that a party was liable to another in tort. She analysed *McKenna v Best Travel Ltd* [1998] 3 IR 57 and a number of the United Kingdom cases including *Hone v. Going Places Leisure Travel Limited* [2001] EWCA Civ. 947, *Wong Mee Wan v. Kwan Kin Travel Services Limited* [1996] 1 WLR 38 and *Healy v. Cosmosair Plc, Antonio Simoes*

Louren‡o and Vilar Da Lapa Administracao De Propriedades LDA [2005] EWHC 1657 (QB). The result of that analysis was (at p. 373): -

> "The conclusions to be drawn from all of the above cited cases are that, both before and after the coming into force of the Directive and its transposition in national law, the established principle is that the organiser is not an insurer to the customer. The High Court judge correctly found that the hotel proprietor was not such an insurer under the legislation. The above cases also establish the principle that the test is not one of strict liability, and in that regard I am satisfied also that the High Court judge's finding, when correctly read, was not that strict liability applied. The final principle clearly established by those cases is that the standard by which the acts in question are to be judged is that of reasonable skill and care, which standard, if not expressed in a contract will be readily implied into it. In the circumstances, I am satisfied that the reasonable skill and care test generally applicable according to the above case law and by statute, and applied by the High Court judge, was the correct test in law."

23. Before arriving at that conclusion, Macken J. had noted, in an apparently *obiter* passage, that if there was a difference between Irish and Spanish law on the appropriate legal standards governing the safety of hotels for visitors or guests, the application of the lower standard might not necessarily comply with the provisions of the Directive. She noted the opinion of Advocate General Tizzano in *Leitner v. TUI Deutschland GmbH& Co. KG* (Case C – 168/00) [2002] E.C.R. 1-02631, that the provisions of the Directive must be interpreted in the manner most favourable to the person they are intended to protect, namely the consumer of the tourism service. Macken J. noted however, that the point did not appear to have been at issue in the High Court.

24. On the facts of the case, however, she held that there was clear evidence that the hotel had in place a system to deal with spillages but had failed to activate it so as to prevent the plaintiff's accident. She was satisfied that the High Court judge had evidence before him that the accident was a wholly foreseeable event and was entitled to find that the service in question was not supplied with reasonable skill and care. The appeal was dismissed.

25. It was therefore, unnecessary for the court in reaching this conclusion to answer the question of whether the standard operating in Spain or the standard in Ireland was the appropriate one to apply. Nor does it appear that the question arose in circumstances where no evidence appears to have been led by the defendant that a lower standard applied in Spain which had been complied with. It seems clear from the observations of Macken J. above cited that the court considered that the principles to be derived from the UK cases to which she referred are persuasive in this jurisdiction.

United Kingdom Cases

26. In the present case, the English authorities analysed by the trial judge endorse the reasonable skill and care test but consider also, that local standards may be highly relevant. One of the early authorities on this point is *Wilson v. Best Travel Limited* [1993]

1 All E.R. 353, which pre-dated the incorporation of the Directive into English law in 1992. The plaintiff, while staying in a hotel in Greece on a holiday booked through the defendant tour operator, sustained serious injuries after tripping and falling through glass patio doors at the hotel. The doors were fitted with ordinary glass which complied with Greek Standards, whereas British Standards would have required the use of safety glass. The plaintiff's claim failed. The following passage from the judgment of Phillips J. has been considered authoritative in many of the subsequent cases, including those post-dating the introduction of the Directive (at p. 358): -

> "What is the duty of a tour operator in a situation such as this? Must he refrain from sending holidaymakers to any hotel whose characteristics, insofar as safety is concerned, fail to satisfy the standards which apply in this country? I do not believe that his obligations in respect of the safety of his clients can extend this far. Save where uniform international regulations apply, there are bound to be differences in the safety standards applied in respect of the many hazards of modern life between one country and another. All civilised countries attempt to cater for these hazards by imposing mandatory regulations. The duty of care of a tour operator is likely to extend to checking that local safety regulations are complied with. Provided they are, I do not consider that the tour operator owes a duty to boycott a hotel because of the absence of some safety feature which would be found in an English hotel unless the absence of such a feature might leave a reasonable holidaymaker to decline to take a holiday at the hotel in question."

27. In *Evans v. Kosmar Villa Holidays Limited* [2008] 1 W.L.R. 297, the seventeen-year-old plaintiff was severely injured when he dived at night into the shallow end of a swimming pool at an apartment complex in Corfu. He sued the tour operator on the basis that there had been a failure to exercise reasonable skill and care on the part of the apartment complex owners in failing to have proper "No Diving" signs and depth markers. He succeeded in the Queen's Bench Division, subject to a fifty percent reduction for contributory negligence. However, the Court of Appeal allowed the defendant's appeal and dismissed the claim. The sole judgment was given by Richards L.J. with whom the other members of the court agreed. He said (at page 306): -

> "23. A claim such as that in *Wilson v. Best Travel Limited* [1993] 1 All E.R. 353 would no doubt be put differently under the 1992 Regulations: since the tour operator is directly liable under those regulations for improper performance of the contract by the hotel even if the hotel is under independent ownership and management, the focus can be on the exercise of reasonable care in the operation of the hotel itself, rather than in the selection of the hotel and the offer of accommodation at it. But I do not think that this affects the principle laid down as to the standard to be applied to a hotel abroad, namely that the hotel is required to comply with local safety regulations rather than with British safety standards. That was the approach in *Codd v. Thomson Tour Operators Limited* The Times 20 October 2000; Court of Appeal (Civil Division) Transcript Number 1470 of 2000, in which the claimant had been injured while travelling in a lift at a hotel in which he

was staying in Majorca. The tour operator accepted that it would be liable, (presumably under the 1992 Regulations) if negligence was established against those who were responsible for running and managing the hotel, but the judge found that liability was not established. The Court of Appeal dismissed the claimant's appeal, citing *Wilson v. Best Travel Limited* [1993] 1 All E.R. 353 for the proposition that there was no requirement for the hotel to comply with British safety standards, and holding that there was no breach of local safety regulations and that there was no negligence by the hotel management either in relation to the maintenance of the lift or in relation to safety procedures.

24. In the present case, there was no evidence to support the pleaded claim of non-compliance with local safety regulations, and that way of putting the case was not pursued at trial. In my view, however, it was still open to the claimant to pursue the claim on the other bases pleaded in the amended particulars of claim. What was said in *Wilson v. Best Travel Ltd* did not purport to be an exhaustive statement of the duty of care, and it does not seem to me that compliance with local safety regulations is necessarily sufficient to fulfil that duty. That was evidently also the view taken in *Codd*, where the court found there to be compliance with local safety regulations but nevertheless went on to consider other possible breaches of the duty of care."

28. In *Gouldbourn v. Balkan Holidays Limited and Anor*. [2010] EWCA Civ 372, the plaintiff booked a skiing holiday in Bulgaria with the defendant tour operator. She had never skied before. After some initial tuition on nursery slopes, the locally qualified instructor brought her to a slope which she was unable to negotiate safely and fell, suffering injuries. The plaintiff lost the case at first instance and her appeal was dismissed by the Court of Appeal. Giving the leading judgment, Leveson L.J. considered the appropriate standard to be applied (at para. 12): -

"As to the test, [*counsel for the defendant*] successfully argued that the proper test was whether [*the ski instructor*] exercised reasonable care and skill as a ski instructor in Bulgaria, which required an analysis of local standards rather than the standards that might be applied in this or any other country. As a result the judge concluded:

'… on western European standards [*the instructor*] probably failed to assess her ability correctly and was too quick to take her up onto this slope…

44. That said, on the central issue of negligence, I am driven to the conclusion that [*the instructor's*] conduct must be judged against the relevant local standards, and that I have no evidence which can satisfy me that he has failed to show reasonable care by reference to such standards. It may be that he fell below those standards but that is not something which I can properly infer from the evidence I have heard.'

The question for this court is whether that approach is correct."

29. The court ultimately held that the trial judge was entitled to come to this conclusion. In commenting on the prior case law, Leveson L.J. said (at para. 19 – 20): -

> "19. It is a mistake to seek to construe the judgment of Phillips J. [*in Wilson*] as if it was a statute: see the observations of Richards L.J. in *Evans v. Kosmar Villa Holidays Plc.* [2008] 1 WLR 297 at para. 224, p. 3068 to the effect that the case did not purport to be an exhaustive statement of the duty of care. Nevertheless it does identify a very important signpost to the correct approach to cases of this nature, which will inevitably impact on the way in which organisations from different countries provide services to UK tourists. To require such organisations to adopt a different standard of care for different tourists is quite impracticable. What might be required for American tourists may well be different to that required by a French or Western European tourist, itself different to that required by a Japanese tourist. Neither do I consider that the Regulations impose a duty on English tour operators to require a standard of care to be judged by UK criteria or necessarily western European criteria.
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> 20. In my judgment the reference to 'uniform international regulations' *[in Wilson*] is intended to do no more than include into any assessment of the standard of care those standards which the relevant country has accepted and adopted. Thus, I agree that a general requirement never to allow pupils to take any risk beyond their capability imposes a duty of care to pupils in that regard, but it does not identify or mandate the way in which that duty should be fulfilled."

30. In *Lougheed v. On the Beach Limited* [2014] EWCA Civ 1538, the plaintiff went on a package holiday to a hotel in Spain where she slipped on a patch of water on steps, suffering an injury. She succeeded in the County Court but failed on appeal before the Court of Appeal. Again, the issue of compliance with local standards loomed large in the case. The leading judgment was given by Tomlinson L.J. with whom the other members of the court agreed. In considering the issue of the relevance of local standards, he reviewed the authorities, including *Wilson and Evans*, and also a case *called Holden v. First Choice Holidays* (at para. 9 et seq.): -

> "… Standards of maintenance and cleanliness vary as between countries and continents and indeed what is reasonably to be expected in a five star hotel in a Western European capital differs from what is reasonably to be expected in a safari lodge, however well-appointed. There may perhaps be certain irreducible standards in relation to life-threatening risks, but to expect uniformity of approach on a matter such as the frequency of inspection and cleaning of floor surfaces is unrealistic. An Englishman does not travel abroad in a cocoon.
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> 10. *Holden v. First Choice Holidays and Flights Limited* 22 May 2006, unreported, was a case decided by Goldring J., as he then was, under the Regulations. Mrs. Holden fell down some stairs in a hotel in Tunisia. It was found that she had slipped on some spilt liquid, probably a spilt drink. The question arose as to the standards to be required of the hotelier and whether a member of staff was required to be

stationed to monitor spillages on the staircase. The judge held that the duty of care was that set out by Phillips J. in *Wilson v. Best Travel*. He held that it was for the claimant to prove that the defendant fell short of the standards applicable in Tunisia. The claimant had adduced no evidence of such standards and there was no material before the court on the basis of which inferences could be drawn as to the content of those standards. The Recorder in the court below had drawn inferences as to the standards applicable from evidence concerning the care received by the claimant in hospital in Tunisia, and from evidence as to the standards applied by another company in another hotel. Goldring J. rejected that approach. At page 11D he said this:-

> 'It does not seem to me that one can infer a local standard from what may well be a higher standard in a particular hotel or by a particular company in particular circumstances. It is no substitute for evidence of what is local custom and what may be the local regulations.' "

31. Tomlinson L.J. was at pains to point out that compliance with local regulations was not the end of the matter. He said (at para. 13): -

> "Plainly compliance with locally promulgated safety regulations may not be the end of the enquiry. The regulations may be recognised locally as inadequate. There may be steps routinely taken to draw attention to risks tolerated by the local regulations, as for example the placing of a warning sticker on untoughened glass. One would not expect to find locally promulgated regulations governing the frequency with which a hotel floor should be either cleaned or inspected for the presence of spillages on which guests might slip. The standards by which the hotel is to be judged in its performance of such tasks as are unregulated, or where regulations are supplemented by local practice or are recognised to be inadequate must necessarily, and on authority, be informed by local standards of care as applied by establishments of similar size and type."

32. Later in his judgment, the judge returned to the same issue: -

> "16. It follows that I cannot accept [*counsel for the plaintiff's*] broad submission that local standards are a distraction and not determinative of the issue whether reasonable skill and care has been exercised. I would accept, as is obvious, that mere compliance with locally applicable regulations will not exhaust the enquiry, for the very reason that the locally applicable standards may recognise that such compliance is of itself insufficient. But I reject the suggestion that the English Court can, if it finds local standards to be unacceptable, judge performance in that locality by reference to the standards reasonably to be expected of a similar establishment operating in England or Wales. Such an approach is neither sensible nor realistic. It is also precluded by authority."

33. One of the complaints raised by the appellant in the present appeal is the potential unfairness in requiring a claimant to procure evidence from an expert in the foreign

country where the accident occurred as to locally applicable standards. She contends that this is an unreasonable burden to impose on a claimant and one contrary to the spirit and intent of the Directive. In that regard, it is I think useful to record the comments of Tomlinson L.J. in the same case when considering the question of whether the trial judge wrongly relied on the evidence of the manager of the hotel where the accident occurred as evidence of local standards. In that regard, the court stated: -

> "27. The judge recognised that standards may not be the same in Spain as in the UK and that there will be cases where the court is unable to draw an inference of want of care without sufficient evidence of Spanish standards. In my judgment this is just such a case, both because of the lack of relevant evidence on a point on which the claimant bore the evidential burden, and because it was not a proper case in which to draw an inference, without more, of a lack of proper care. I deal separately with the second point under Ground 2 below. I would not however wish it to be thought that evidence of relevant local practice or standards can only be given by an expert witness called as such, or at any rate in the form of a report of an expert for the introduction of which evidence the permission of the court has been given. I agree with [*counsel for the defendant*] that it is ordinarily preferable that evidence of these matters should be given in that way, not least because both the opponent party and the court has the protection and the reassurance of the standard form of declaration given by any person who seeks to give expert evidence. A claimant who chooses not to adduce such evidence in a case of this sort does so at his peril. That is not however to say that the evidence could not in an appropriate case be given by an appropriately experienced and qualified individual who nonetheless did not put himself forward as professing expertise in the field. Because cases are infinitely various, and the exigencies of litigation unpredictable, I would not wish to be over-prescriptive. However for the reasons I have given the point does not here arise because the evidence of [*the hotel manager*] does not in my view bear the weight which the judge put upon it."

34. *Kerr v. Thomas Cook Tour Operations Limited* [2015] NIQB 9 is a recent Northern Ireland case where similar issues concerning local standards arose. The plaintiff went on a package holiday to a hotel in Tunisia. She was attacked by a cat on the hotel grounds and injured. Evidence was given that there were a large number of cats roaming freely throughout the hotel grounds and that this situation had existed for some time prior to the incident in question. The plaintiff called no evidence from an expert as to relevant local standards in Tunisia. The defendant called no evidence. In his judgment, Maguire J. reviewed many of the authorities to which I have already referred, noting that the standard to be applied was that of reasonable skill and care. He said (at para. 17): -

> "In this case there has been no evidence adduced by the plaintiff which establishes the standard of care which the court should apply. It seems to the court that, unless there is such evidence, the court is unable to conclude that there has been a breach of the obligation. Consequently, with reluctance, the court is forced to conclude that the plaintiff has failed to prove her case. While [*counsel for the*

plaintiff] sought to escape this conclusion by arguing that in this area of the case the onus of proving that it acted with reasonable care and skill should rest with the defendant, the court is unable to accept this submission which was unsupported by authority."

35. With the exception of *Gouldbourn*, it must be recognised that all of these cases were concerned with the static condition of the premises as distinct from the conduct of a particular activity. However, *Gouldbourn* also endorsed the proposition that local standards were equally to be considered in the context of an activity. People engage in many leisure pursuits such as contact sports or adventure activities like hang gliding, sky diving, white water rafting, winter sports, motor sports and an endless list of extreme sports, all of which have an element of danger as an inherent part. Holiday makers in particular will naturally want to have new experiences.

36. People willingly participate in such things, even not involving an element of skill, because the pleasure to be derived from them comes in part at least, from the excitement and exhilaration of being exposed to such danger, albeit in a controlled way that is reasonably safe. This is what generates the enjoyable "adrenaline rush" of the kind described in the advertising material for this ride. Clearly, any holidaymaker seeking a relaxed cruise would be unlikely to participate. In the present case, it could not be suggested that the appellant's experience was other than what she signed up to. Even a cursory viewing of the promotion material for this boat ride showed that the passengers could expect to be subjected to significant forces and impacts which might result in bumps and bruises. It would be entirely unreasonable to suggest that such, without more, could give rise to liability on the part of the operator.

37. In fairness to the appellant, it was not at any stage suggested that there was anything negligent about the way in which the skipper drove the boat. It was what was promised. The criticism was of the static condition of the boat with the sole exception of the skipper's repositioning of the appellant after the first 360 degree turn. The trial judge dealt with that contention appropriately in my view.

Discussion

38. The cases to which I have referred above were also the subject of careful analysis by the trial judge leading him to state his conclusions on the law. They were also the subject of considerable debate in this appeal. In the light of that, although it might be said that his ultimate conclusion did not depend on that analysis, it is in my opinion appropriate that I should express a view on these issues.

39. I think a consideration of these authorities suggests that the following principles may be distilled:

    (a) In claims pursuant to section 20 of the 1995 Act, the appropriate test is whether reasonable skill and care have been employed in the provision of the service complained of;

(b) the standard by which the test of reasonable skill and care is to be judged is the standard, as distinct from the law, applying in the place where the event complained of occurs. The issue of liability is to be determined by reference to Irish law;

(c) if there are internationally recognised norms applicable to the facts of the case, the court is entitled to have regard to these in its assessment of whether reasonable skill and care has been used;

(d) Per *Scaife*, there may be cases where the court can have regard to the standards prescribed in Irish legislation such as the Hotel Proprietors Act 1963 and the Occupiers Liability Act 1995 in determining whether there has been compliance with the Directive and the 1995 Act;

(e) it will not necessarily be a defence to a claim to show that local regulations were complied with, if such are recognised locally as inadequate, or are so patently deficient that any reasonable person would view them as obviously inadequate; conversely, there may be a requirement to comply with local standards that are higher than those obtaining in this jurisdiction;

(f) the tour operator is not to be regarded as an insurer;

(g) the onus of proving that the relevant service has been provided without reasonable skill and care rests upon the plaintiff and accordingly, it is for the plaintiff to establish that any relevant standard has not been complied with;

(h) it will normally be difficult for the court to make an assessment of whether reasonable skill and care has been used in the provision of the service, absent evidence of relevant local standards, as distinct from Irish standards, subject to (d) above

(i) the court should not be overly prescriptive as to how compliance with local standards is to be proved. It is not necessarily the case that such proof can only be provided by a locally qualified expert, subject always to the rules of evidence and the relative weight to be attached to non-expert evidence.

(j) The parties may, of course, expressly contract for the provision of a service to a particular standard, as the trial judge pointed out.

40. It follows from the foregoing that I cannot accept the contention of the appellant that an onus fell upon the respondents to demonstrate compliance with local regulations. That would be to reverse the burden of proof. In the present case, the appellant's engineer was not in a position to offer evidence as to the standards and regulations, if any, that applied to the activity in question in St. Maarten. Indeed he was not in a position to offer evidence as to any such standards or regulations that might apply to such an activity in Ireland.

41. The engineer's evidence could therefore only be viewed as what might amount to the use of reasonable skill and care in such an activity in this jurisdiction but on that basis, the trial judge considered, in my view correctly, that even then it would not have been possible to attribute negligence to the respondents. The appellant criticises the trial judge's view of the engineer's evidence in some particular respects. In the context, for example, of the suggestion that the boat should have been fitted with seatbelts, the judge pointed to the very obvious risk that such devices would pose if the boat capsized, an issue apparently raised in cross-examination of the engineer.

42. Similarly, criticism is made of the fact that the judge's conclusion that the provision of a side bar might have amounted to a trip hazard was one unsupported by any evidence. While that might be strictly speaking true, it has to be remembered that the only evidence the engineer could offer of this being a necessary feature was a trip on a boat on the Thames. Certainly in the case of the seatbelts and padding on the gunwales, beyond the engineer speculating that these would be desirable features, there was no evidence offered by him of any similar craft with similar features.

43. While the appellant claims that no countervailing evidence was led by the respondent, it does not follow that merely because this evidence was given by the appellant's engineer, the court was obliged to accept it. In any event, the judge's findings on these matters were merely an application of basic common sense. The same goes for his determination that he did not fault the skipper for his action after the first incident in moving the appellant to a different position on the front bench, and not swapping her to the last row. He was entitled to point out the potential for danger at sea in moving two passengers in a fibreglass craft of shallow draft with no walkway between benches.

44. Again, this seems an eminently reasonable conclusion, but whether the judge was right or wrong in reaching these conclusions was ultimately immaterial to the outcome. He correctly held that the appellant had failed to discharge the requisite onus of proving that the service had been provided without reasonable skill and care when judged against applicable local standards (at para. 53). This was not determinative however, because he further held (at para. 61) that, even judged by any relevant Irish standard, he still could not find that there had been a breach of duty by the respondents. At the end of the day, as the trial judge put it, this was unfortunately an injury that simply occurred during the course of a vigorous activity.

Conclusion

45. I am satisfied that the trial judge identified the appropriate legal test and correctly applied it to the facts of this case. His conclusion was, in any event, stress tested against any relevant Irish criteria and even then the judge was rightly of the view that he could still not find that the service was provided without reasonable skill and care.

46. I therefore agree with his conclusion and for the reasons explained would dismiss this appeal.